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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROOSEVELT DANIELS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in treating an expired grand jury as extended based on recitations contained in a judicial "order" that was ghostwritten by the government, premised on false facts, and procured *ex parte* from a judge who was without jurisdiction?

2. Whether the extension of a special grand jury based solely on a disputed, unrecorded and uncommunicated mental determination of a chief judge without entry of a court order violates 18 U.S.C. §3331?

3. Whether the Seventh Circuit erred in expanding the "ordinary course of duty" exception to Title III's warrant requirement in direct conflict with other federal courts of appeals?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Roosevelt Daniels, Edward Fitzgerald, Lawrence Lee and Sandra Campbell, and the Respondent United States of America.

These same parties are the Petitioners and Respondent, respectively, before this Court.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Roosevelt Daniels, Edward Fitzgerald, Lawrence Lee and Sandra Campbell respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on May 10, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 902 F.2d 1238, and is reprinted in the Appendix hereto at App. 1.

The order of the Court of Appeals denying Petitioners' Petition for Rehearing With Suggestion for Rehearing *En Banc*, dated June 11, 1990, is reprinted in the Appendix hereto at App. 14.

JURISDICTION

Petitioners were charged in the United States District Court for the Northern District of Illinois with violations of 18 U.S.C. §1962(c) and 21 U.S.C. §§841(a)(1), 843(b), 846 and 848. The District Court exercised jurisdiction pursuant to 18 U.S.C. §§3231 and 3232. On May 5, 1989, the District Court entered its judgment of conviction and sentence upon Petitioners.

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit, invoking jurisdiction under 28 U.S.C. §1291. The Seventh Circuit affirmed the orders of the District Court on May 10, 1990. *See* App. 1. On May 24, 1990, Petitioners filed a timely Petition For Rehearing With Suggestion For Rehearing *En Banc*. On June 11, 1990, the Seventh Circuit denied the petition for rehearing. *See* App. 14.

Petitioners invoke the jurisdiction of this Court to review the judgment and order of the Seventh Circuit under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §3331. Summoning and term.

(a) In addition to such other grand juries as shall be called from time to ~~time,~~ each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the cir-

cuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

FED. R. CRIM. P. 55. Records.

The clerk of the district court and each United States magistrate shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.

18 U.S.C. §2510. Definitions.

As used in this chapter . . .

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties[.]

18 U.S.C. §2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency,

regulatory body, legislative committee, or other authority of the United States, a State, or a political Subdivision thereof if the disclosure of that information would be in violation of this chapter.

STATEMENT OF THE CASE

Grand Jury Issue

Petitioners Roosevelt Daniels, Edward Fitzgerald, Lawrence Lee and Sandra Campbell ("Petitioners") were charged in a series of indictments with violations of various sections of Titles 18 and 21 of the United States Code. They pled guilty to a second superseding indictment[1] and were sentenced on May 5, 1989 to terms of imprisonment of 40, 20, 15 and 12 years, respectively.

On August 26, 1986, the second superseding indictment was returned. Petitioners initially pled not guilty to the charges in the indictment, but changed their pleas to guilty as to all charges on September 9 and 10, 1986. Prior to sentencing, however, Petitioners discovered that the term of the grand jury which returned the second superseding indictment against Petitioners, the Special October 1984 Grand Jury ("Grand Jury"), had expired and had not been extended.

On February 27, 1987, Petitioners filed a motion for writ of *habeas corpus* in the district court, demanding their immediate release from custody on the ground that the indictment pending against them was invalid because it

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[1] Roosevelt Daniels was charged with violating 18 U.S.C. §1962(c) and 21 U.S.C. §§841(a)(1), 843(b), 846 and 848. Edward Fitzgerald was charged with violating 18 U.S.C. §1962(c) and 21 U.S.C. §§841(a)(1) and 846. Lawrence Lee was charged with violating 18 U.S.C. §1962(c) and 21 U.S.C. §§841(a)(1), 843(b) and 846. Sandra Campbell was charged with violating 18 U.S.C. §1962(c) and 21 U.S.C. §§843(b) and 846.

was returned by an expired grand jury. At a court hearing that day, the United States Attorney (the "Government") admitted that no order could be found in the court clerk's office extending the Grand Jury. Nonetheless, the district court denied the requested relief, finding that "nothing before [the court] indicate[s] that [the] grand jury was invalidly constituted at the time that it returned [the second superseding] indictment." App. 19.

Upon the denial of their motion for writ of *habeas corpus*, Petitioners filed a petition for writ of *mandamus* with the Seventh Circuit Court of Appeals on March 2, 1987, arguing that they were unconstitutionally being held in custody pursuant to an invalid indictment. The Government filed its response on March 4, 1987, stating that the factual and legal issues concerning the expiration of the Grand Jury had not been fully presented to District Court Judge Holderman, to whom this case was assigned. The Government further stated that it was in the process of developing the facts surrounding the alleged extension of the Grand Jury and would report its findings to him. Accordingly, on March 5, 1987, the Court of Appeals denied Petitioners' *mandamus* petition as premature. App. 22. The appellate court explicitly noted that Judge Holderman had yet to evaluate all of the evidence regarding the alleged extension of the Grand Jury's term and that he would be hearing evidence on the issue. *Id.*

Subsequently, Petitioners' counsel learned that then-Senior District Court Judge Frank J. McGarr was purported to be somehow involved concerning the issue of the alleged extension of the Special October 1984 Grand Jury. Judge McGarr had been Chief Judge of the district, and therefore in charge of grand juries, at the time the Grand Jury issued Petitioners' second superseding indictment. In March 1987, however, he was not involved with any matter pertaining to grand juries.

Counsel for Petitioner Daniels wrote a letter to Judge McGarr on March 9, 1987 regarding any current involvement by Judge McGarr with the extension issue and objecting to any proceedings being held without counsel's appearance and participation. App. 60. Daniels' counsel also informed Judge McGarr that the issue of the Grand Jury's validity was already the subject of a pending motion before Judge Holderman and stated his belief that Judge McGarr lacked jurisdiction as to the Grand Jury since he was no longer Chief Judge and since no case or controversy was pending before him. *Id.* Judge McGarr replied to Daniels' counsel by letter dated March 10, 1987 stating that he had already entered an order concerning the alleged extension of the Grand Jury and that, upon reconsideration, he believed his entry of the order was proper. App. 63.

Also on March 9, 1987, the Government submitted a "report" to Judge Holderman concerning the alleged extension of the term of the Special October 1984 Grand Jury. App. 55. The Government's "report" consisted entirely of an affidavit-like order which facially appeared to be written by Judge McGarr.[2] App. 57-59. The "order" purported to extend *nunc pro tunc* the Grand Jury's term from March 25, 1986 to September 25, 1986, and then held valid all indictments returned during this period. *Id.* The "order" was undated and contained no case number or case caption. The only date shown on the order was Judge McGarr's "Received" stamp dated March 3, 1987, at which

[2] Judge McGarr found that, based on his own "dealings" with the Grand Jury and his own "recollections," he had ordered the Grand Jury to serve an additional six months. App. 57-59.

time Petitioner's *mandamus* petition was pending in the Court of Appeals.[3]

The Government appeared *ex parte* before Judge McGarr and without notice to Petitioners to obtain this "order." Petitioners later discovered that the "order's" findings are nearly identical to those in two *other* orders the Government obtained from Judge McGarr pertaining to two *different* grand juries. *See, e.g., United States v. Taylor*, 841 F.2d at 1330, 1304 n.10 (7th Cir.), *cert. denied sub nom. Rosenstein v. United States*, 487 U.S. 1236 (1988). Later still, the Government conceded that the order signed by Judge McGarr had actually been written by the Government, not by Judge McGarr.[4] Nonetheless, Judge Holderman treated Judge McGarr's "order" as a valid and binding judicial order. App. 25-27.

On March 23, 1987, Petitioners moved to withdraw their guilty pleas and dismiss the second superseding indictment on the grounds that it had been returned by a special grand jury that had not been extended pursuant to 18 U.S.C. §1331(a). R. 426. Petitioners also requested an evidentiary hearing and moved for discovery to fully develop the facts concerning the expiration and the alleged extension of the Grand Jury's term, as required in the Court of Appeals' order of March 5, 1987. R. 424. Petitioners' motion was fully briefed on April 6, 1987. R. 437.

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[3] When the Government filed its response to Petitioners' mandamus petition on March 4, 1987, which told the Seventh Circuit that the grand jury issue was factual in nature and that it was still gathering the facts, the Government had already obtained Judge McGarr's order, which it only later filed in the district court and which it there asserted precluded any examination of the facts and conclusively determined the issue of the Grand Jury's alleged extension.

[4] Although Petitioners questioned the authorship of the "order" from the outset, the Government did not admit to writing the order until it filed its appellate brief in the instant case.

Over one year later, on April 8, 1988, Judge Holderman denied Petitioners' motions, allowing no discovery or evidentiary hearing relating to the expiration and alleged extension of the Grand Jury. App. 42-43. On May 5, 1989, the district court entered its judgment of conviction and sentence. Petitioners timely filed their respective notices of appeal from the district court's denial of their motions to dismiss.

On May 10, 1990, the Seventh Circuit affirmed Petitioner's convictions. *United States v. Daniels*, 902 F.2d 1238 (7th Cir. 1990). The Seventh Circuit found that Judge McGarr's purported order was "not really an order," but was merely evidence. 902 F.2d at 1240, App. 3. The Court of Appeals also noted that Petitioners had submitted evidence that the purported order was "not reliable."[5] *Id.* at 1241, App. 3. Further, the Seventh Circuit found that whether Judge McGarr actually extended the Grand Jury when he was Chief Judge was a "question of fact". *Id.* at 1242, App. 6. The Court of Appeals nonetheless refused to remand the matter for an evidentiary hearing, stating that, although "[t]he 'evidentiary hearing' conducted in this case to determine Judge McGarr's recollection was unsatisfactory, . . . we do not think it was so defective that we should remand for a further hearing at which Judge McGarr would be placed under oath, examined,

[5] Petitioner's primary evidence, which they attempted to present to both the district court and the Court of Appeals, but which both courts failed to address, were transcripts of each of the Grand Jury's actual appearances before then-Chief Judge McGarr during the time he allegedly extended the Grand Jury's term. None of these transcripts gives any indication that Judge McGarr either extended the Grand Jury's term or was even made aware of a *need* to extend it.

and cross-examined, with results entirely predictable."[6] *Id.*, App. 7.

Wiretap Issue

On July 8, 1985, the FBI received "informant" information that Petitioner Daniels was utilizing the Metropolitan Correctional Center ("M.C.C.") prisoner telephone to engage in outside narcotics trafficking. R. 284, Exhibit B, ¶13. At that time, M.C.C. officials began intercepting and recording Daniels' telephone conversations on the inmate pay telephone at the M.C.C. for the first time since Daniels was incarcerated on April 15, 1985. R. 260, Exhibit E. On August 1, 1985, M.C.C. officials provided the FBI with six hour-long cassette tapes of Daniels' intercepted telephone conversations. R. 260, Exhibit E. After this meeting, M.C.C. officials continued to intercept Daniels' telephone conversations. An additional eleven cassette tapes containing telephone conversations monitored by the M.C.C. were later turned over to the FBI. R. 260, Exhibits A, B, C and G. Two of the conversations intercepted by the M.C.C. in July 1985 were utilized by the FBI as probable cause for the issuance of a Title III electronic surveillance order on August 27, 1985. R. 283, Exhibit B, ¶¶17 and 22. Subsequently, the FBI took over monitoring Daniels' telephone conversations from the M.C.C. officials.

A superseding indictment was returned on October 22, 1985, charging Petitioners with additional violations of 21

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[6] As stated above, no evidentiary hearing was ever held concerning this matter. In denying Petitioners' motions, the district court specifically stated that "there's no need for an evidentiary hearing," App. 42, and the Government has never contended that any such hearing took place. The Seventh Circuit's use of quotation marks around the words "evidentiary hearing" may indicate recognition of this fact.

U.S.C. §§841(a)(1) and 843(b) and extending the time frame of the charges based on the FBI's wiretaps of Daniels' conversations. R. 134. These violations were also included in the second superseding indictment. On August 21, 1986, Petitioners filed a motion to suppress the tape recordings secured by the FBI pursuant to the August 27, 1985 order on the grounds that the order was based on the M.C.C.'s earlier illegal wiretaps. R. 260. On September 2, 1986, Judge Holderman denied the motion to suppress solely on the ground that Daniels consented to any electronic surveillance conducted by either the M.C.C. or the FBI. App. 77-78.

On appeal, the Seventh Circuit specifically rejected the district court's finding that Daniels consented to the FBI's surveillance of his telephone conversations. 902 F.2d at 1245, App. 12-13. Notwithstanding that this was the sole basis of the district court's ruling, the Seventh Circuit affirmed the denial of the motion to suppress by making, for the first time, a *factual* finding that the FBI was acting "in the ordinary course of [its] duties" during its surveillance of Daniels. *Id.*, App. 13. The Seventh Circuit ruled that the surveillance was proper under the exception to the order requirement contained in Section 2510(5)(a)(ii) of Title 18. *Id.* The Seventh Circuit did not address the M.C.C.'s earlier, unauthorized wiretaps, the uncontroverted evidence as to their continuous, focused nature, or the fact that these unauthorized wiretaps were the basis for the order which later authorized surveillance by the FBI.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit erred in treating an expired grand jury as extended based on recitations contained in a judicial "order" that was ghostwritten by the government, premised on false facts, and procured *ex parte* from a judge who was without jurisdiction.

In February 1987, the Government found itself faced with a massive administrative problem: the potential release of approximately 200 defendants indicted by grand juries[7] which had not been extended beyond their initial terms. Rather than issuing valid new indictments, the Government chose to violate the due process rights of Petitioners and others by writing an affidavit-like order which it presented *ex parte* to a judge to whom Petitioners' case was not assigned in order to create the illusion that the Grand Jury had been extended. Despite the Seventh Circuit's acknowledgement of these uncontradicted facts, the instant opinion fails to take any action to rectify this grave miscarriage of justice, thereby compelling this Court's intervention.

Once Petitioners discovered that no order existed extending the term of the Grand Jury which indicted them, Petitioners immediately moved for entry of a writ of *habeas corpus* to obtain their release from custody on the grounds that they were being held pursuant to an invalid indictment. In response to this motion, the Government informed both District Court Judge Holderman and Petitioners that it was seeking to locate existing records documenting the Grand Jury's extension. App. 17. Instead, the Government

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[7] Although at least three grand juries were not properly extended, only the Special October 1984 Grand Jury is at issue here. Many of the indictees had already had their criminal charges resolved by trial or plea.

engaged in an unconstitutional course of action calculated to mislead the district court and to deny Petitioners the most fundamental of due process rights.

The Government approached former Chief Judge McGarr *ex parte*, without notice to either opposing counsel or Judge Holderman, and presented Judge McGarr with a *nunc pro tunc* "order" it had already written.[8] The Government's "order" purported to be Judge McGarr's own work product and made findings of fact based on Judge McGarr's purported personal recollections and the recollections of some grand jurors not before Judge McGarr.[9] These "findings of fact" were nothing more than a contrived story the Government invented in an attempt to save guilty pleas, verdicts and administrative disruption in a number of cases. Judge McGarr signed the "order" while the issues it "ruled upon" were pending before Judge Holderman and at a time when Judge McGarr had no authority over grand juries and had no cases assigned to him.[10]

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[8] In *In re Wisconsin Steel Corp.*, 48 B.R. 753 (N.D. Ill. 1985), far less egregious conduct by Chief Judge Charles McCormick in a bankruptcy case caused the Seventh Circuit to censure publicly Judge McCormick in a letter that described the judge's actions as "disquieting and "shock[ing]." By failing to even acknowledge the gross impropriety of the Government's *ex parte* conduct and its attempts to mislead the district court and the Court of Appeals, the Seventh Circuit is now in the position of holding the Government to a *lower* standard of conduct in criminal cases than civil litigants in bankruptcy disputes.

[9] The full text of the *nunc pro tunc* "order" is reprinted at App. 51.

[10] Such conduct, at the least, runs clearly contrary to longstanding ethical and professional codes of conduct, *see, e.g.*, ABA Code of Judicial Conduct, Canon 3C; *In re Wisconsin Steel Corp.*, 48 Bankr. 753, 759 (N.D. Ill. 1985), and the Government's use of Judge McGarr's "order" in other cases was a matter of some outrage at the district court level. *See, e.g., United States v. Lytle,*

(Footnote continued on following page)

The Government then presented the McGarr *nunc pro tunc* order to Judge Holderman as the sole piece of "evidence" in support of the Government's contention that the Grand Jury had been properly extended. App. 55. Upon receipt of the "order," and without knowledge of the details of its origin, Judge Holderman found the "order" to be a valid judicial order and fully binding upon him. App. 26, 34. Thus, he dismissed Petitioners' motion, denied all requests for an evidentiary hearing on the matter and ruled that any factual findings regarding the Grand Jury's validity were unnecessary. App. 42-43. The Government had thus succeeded in its effort to preclude any examination of the true facts surrounding both the purported extension of the Grand Jury and the Government's "remedial" efforts.

This is precisely the result which Petitioners' counsel sought to avoid by writing to Judge McGarr on March 9, 1987 and informing him (a) that the matter involved contested issues of fact pending before Judge Holderman, (b) that Judge McGarr was without jurisdiction to rule on the matter, and (c) that Petitioners demanded to be heard if Judge McGarr contemplated taking any action. App. 60. Nonetheless, Judge McGarr not only entered his "order" without Petitioners' participation, but also, upon receipt of counsel's letter, *reconsidered* the matter and again denied Petitioners an opportunity to participate. App. 63. Judge McGarr and the Government deliberately excluded Petitioners from the process through which the dispositive "order" was obtained and denied Petitioners any opportunity to challenge the ghostwritten recitations and conclusions it contained. In effect, the Government, through

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[10] *continued*
658 F.Supp. 1321, 1326 (N.D. Ill. 1987) ("*Nunc pro tunc* orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact").

Judge McGarr, ruled on Petitioners' motion to dismiss pending before Judge Holderman.

The Seventh Circuit disagreed with Judge Holderman's finding that Judge McGarr's *nunc pro tunc* "order" was a valid and binding judicial order, determining instead that, as a matter of law, it was not a legal order and that its only value was "evidentiary." *United States v. Daniels*, 902 F.2d 1238, 1240-41 (7th Cir. 1990), App. 3. Instead of remanding the case to Judge Holderman for an evidentiary hearing, however, the Seventh Circuit concluded that there was no need to remand because there is a presumption of judicial integrity and it could therefore guess the outcome of a hearing. *Daniels*, 902 F.2d at 1242, App. 6-7.

Such appellate fact-finding directly conflicts with this Court's repeated emphasis on the division of roles between trial and appellate courts in the federal system.[11] The Seventh Circuit ignored the clear precedents in both this Court and the circuits[12] by making an evidentiary finding in the absence of *any* findings of fact at the district court level.

Once the Seventh Circuit had reversed Judge Holderman's holding that the *nunc pro tunc* "order" was valid and binding, the clear course for the appellate court was to remand to the district court for an evidentiary hearing on the validity of the grand jury extension that the "order" precluded. Instead, the Court of Appeals took it upon

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[11] *See Amadeo v. Zant*, 486 U.S. 214, 228 (1988); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Pullman-Standard v. Swint*, 456 U.S. 273, 291-93 (1982); *DeMarco v. United States*, 415 U.S. 449, 450 (1974).

[12] *See, e.g., In re Grand Jury Proceedings*, 857 F.2d 707, 709 (10th Cir. 1988); *Nemmers v. United States*, 795 F.2d 628, 632-33 (7th Cir. 1986); *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 465 (4th Cir. 1983); *Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 568 (8th Cir. 1977).

itself to rule on the validity of the extension of the Grand Jury without the benefit of *any* hearing in which evidence on this issue should have been first presented and evaluated by the district court. *See Daniels*, 902 F.2d at 1242, App. 6-7. Moreover, the Seventh Circuit was very selective about the facts it reviewed. Only the ghostwritten statements[13] contained in Judge McGarr's order were considered by the Seventh Circuit in making its factual determination. *See Daniels*, 902 F.2d at 1241-42, App. 4-7.

The Seventh Circuit completely ignored the Grand Jury transcripts, which clearly show that the factual recitations in the "order" are false. For example, the "order" states that "members of the Special October 1984 Grand Jury recall that they appeared before this Court in March 1986, and that at that time this Court extended the grand jury's term of service." App. 51-52. As the transcripts of all the Grand Jury appearances before Judge McGarr in March 1986 demonstrate, this unsupported allegation is absolutely untrue. App. 67-72. Moreover, although Petitioners were denied any discovery below, Petitioners have evidence indicating that the Government deliberately failed to inform Judge McGarr that the vast majority of grand jurors had absolutely no such recollection.[14]

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[13] Such ghostwritten statements are inherently unreliable. *See, e.g., In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987), (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985)) (when an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming); *Industrial Bldg. Materials. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970) (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 n.4 (1964)) (findings and conclusions prepared by non-objective advocate do not fully and accurately reflect the thoughts entertained by the impartial judge at the time of his initial decision).

[14] Such suppression of evidence is inherently suspect and highlights the dangers inherent in *ex parte* judicial proceedings. *See Brady v. Maryland*, 373 U.S. 83, 86-88 (1963).

The Seventh Circuit plainly violated its function as an appellate court when it presumed that the outcome of any evidentiary hearing would be "entirely predictable." *Daniels*, 902 F.2d at 1242, App. 7. Worse, it based this finding on the very misrepresentations contained in the *nunc pro tunc* "order" written by the Government. The Seventh Circuit then justifies its finding on the general assumption that "judges are . . . honest". *Daniels*, 902 F.2d at 1242, App. 7.

Several circuits have explicitly rejected such presumptions of judicial infallibility. In *United States v. Marr*, 856 F.2d 1471 (10th Cir. 1988), the Tenth Circuit held that "[w]here a record is available which would support or contradict a defendant's factual challenge to his conviction, the district court judge cannot rely solely on his own recollection of events to rule on the merits." 856 F.2d at 1472 (quoting *United States v. Scully*, 798 F.2d 411 (10th Cir. 1986)). In this case, the record of what actually transpired is not only available, but Petitioners' repeated attempts to present it for consideration have been rebuffed.

In *Tyler v. Swenson*, 427 F.2d 412 (8th Cir. 1970), the Eighth Circuit also expressed concerns about the presumed validity of judges' recollections in the absence of an evidentiary hearing, stating that

> [a] member of the judiciary has no peculiar competence in factual recollection of unrecorded events. In fact, the many cases a trial judge participates in may well cloud vivid recollection of detail in a specific case. A party should be permitted to test a judge's recollection, as a witness presenting factual material testimony, as he would any other witness upon cross-examination.

427 F.2d at 415.

Here, Petitioner attempted to present considerable evidence of just the sort suggested in *Tyler*, including the

following facts: (1) the Government, not Judge McGarr, wrote the "order's" recital of the "judge's" recollections and the recollections of a few grand jurors; (2) Judge McGarr's purported recollections in March 1987 recounted events that occurred a *full year* earlier at a time when there were twelve to fifteen grand juries appearing before Judge McGarr; and (3) Judge McGarr signed two *other* orders pertaining to two *different* grand juries that recite findings nearly identical to those contained in the "order" involved here.

Further, it is clear that the Government presented Judge McGarr not with an unbiased view of all the evidence, but with only the evidence the Government wanted him to see. For example, at the time he signed the *nunc pro tunc* "order," Judge McGarr had not been presented with the transcripts which establish, in direct contradiction of the language of the "order," that the Court did not extend the Grand Jury's term of service in March 1986. The transcripts of the Special October 1984 Grand Jury's appearances before Judge McGarr on March 11, 1986, March 18, 1986, and April 1, 1986 were not even prepared by the court reporter until several months *after* the date of the *nunc pro tunc* "order." *See* App. 67-72. These transcripts clearly constitute the best evidence of what occurred.

In any event, the Seventh Circuit's focus on the quality of Judge McGarr's recollection completely misses the mark. The issue here is *what actually happened.* The plain fact is that there has never been a factual record in the District Court or the Court of Appeals regarding the circumstances of the purported Grand Jury extension or the Government's efforts to create the impression that there was such an extension. Such a fundamental denial of Petitioners' due process rights constitutes an abuse of jurisdiction demanding redress by this Court.

II.

The Seventh Circuit's interpretation of 18 U.S.C. §3331 to permit extension of a special grand jury based not on a court order, but solely on the disputed and uncommunicated mental determination of an individual judge, violates the language and procedural protections of the statute.

The Grand Jury which indicted Petitioners was convened under the authority of 18 U.S.C. §3331, the statute which contains the summoning and term provisions of special grand juries. Section 3331 states, in pertinent part, that "[i]f, at the end of [its initial eighteen month] term . . . , the district court determines the business of the grand jury has not been completed, the court *may enter an order* extending such term for an additional period of six months." 18 U.S.C. §3331(a) (emphasis added). Thus, the plain language of §3331 clearly calls for the entry of an order as a prerequisite to the valid extension of a special grand jury.

Despite this language, the Seventh Circuit held, in an earlier case, that "the §3331 extension provision requires only a judicial determination that a special grand jury has not finished its business" and that "the failure to enter formal written orders of extension was not error" which rendered invalid the indictments returned by the Special October 1984 Grand Jury after its term expired on April 1, 1986. *United States v. Taylor*, 841 F.2d 1300, 1302 (7th Cir.), *cert. denied sub nom. Rosenstein v. United States*, 487 U.S. 1236 (1988). In response to the Petitioners' appeal in the instant case, the Seventh Circuit conceded that "[a] judge does not make an order, formal or informal, written or oral, when he decides, without telling anybody, that he has determined that the grand jury has unfinished business." *Daniels*, 902 F.2d at 1242, App. 6. Nevertheless, the appellate court expanded its holding in *Taylor* by per-

mitting a judge's "*uncommunicated* determination that the life of the grand jury should be extended" to have exactly same force and effect as if the judge *had* in fact entered a formal written order. *Daniels*, 902 F.2d at 1240, 1242, App. 26 (emphasis added).

A plain reading of §3331(a) makes clear that the extension process involves two distinct steps. A judicial determination that a grand jury has unfinished business is merely a condition which must be met before the district court can decide whether to enter an extension order. *See United States v. Gillespie*, 666 F. Supp. 1137, 1138 (N.D. Ill. 1987). As one judge has observed, the phrasing of §3331(a) "leads inexorably to the conclusion that, once the district judge determines that the grand jury has more work to do, he still has the option of *either* entering an order to extend the grand jury's term, *or not*." *United States v. Karalis*, 682 F. Supp. 954, 955 (N.D. Ill. 1988) (emphasis original).[15] The wording of the statute allows for discretion by a court which might be presented with countervailing factors that convince it to decline to order an extension of such a grand jury. It is the *order*, not the judge's mental determination, which is the operative judicial act.

This logical reading of subsection (a) of §3331 is given further support by the alternative extension provision authorized in subsection (b) of the statute. That subsection allows a grand jury to act independently by voting to extend a term which the district court declined to extend.

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[15] Although the district court in *United States v. Karalis*, 682 F. Supp. 954 (N.D. Ill. 1988), considered itself bound by the Seventh Circuit's holding in *United States v. Taylor*, the court felt compelled to "register its discomfiture with the *Taylor* opinion" which, in that court's opinion, interprets §3331(a) so as to "read out half of the prerequisites established by Congress for a proper extension of the grand jury's term." *Id.* at 954.

In pertinent part, the subsection provides that if the district court

> fails to extend the term of a special grand jury . . . the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit *for an order* for the continuance of the term of the grand jury. Upon the making of such application by the grand jury, the term thereof shall continue until the *entry* upon such application by the chief judge of the circuit of an appropriate *order*.

18 U.S.C. §3331(b) (emphasis added).

Subsection (b) obviously protects a grand jury with unfinished business from the possibility that a district court will arbitrarily refuse to extend its term by allowing the grand jury itself to obtain an extension order. However, the presence of this subsection is superfluous if subsection (a) was meant to be construed as automatically extending a grand jury whose business has not been completed. Subsection (b) also reiterates the importance of an extension *order*. It provides that after a grand jury votes to extend itself it may apply "to the chief judge of the circuit for an *order* for the continuance of the term . . ." 18 U.S.C. §3331(b) (emphasis added). It is logically inconsistent to assume that a judicial determination of unfinished business creates an automatic extension under subsection (a), while a grand jury's vote to extend itself still requires the entry of an extension order. Further, by stating that the grand jury may appeal the district judge's "failure to extend" the grand jury, rather than stating that the grand jury may appeal the district judge's "failure to find that the grand jury has completed its business," §3331(b) confirms that the mere judicial *finding* is not synonymous with proper *extension* of the term of a special grand jury.

Both the judicial determination of §3331(a) and the grand jury vote of §3331(b) are simply *prerequisites* for an order

extending a §3331 grand jury. Neither of these prerequisites is, by itself, an independent judicial act capable of extending an expired grand jury. Nevertheless, the Seventh Circuit's opinion in this case elevates the district judge's uncommunicated thought processes to the level of official judicial action.

The Seventh Circuit's interpretation of §3331 also ignores Rule 55 of the Federal Rules of Criminal Procedure, which requires that *each* order and judgment made by a federal judge be reduced to writing and entered into the court records. The very existence of Rule 55 demonstrates the importance that the federal courts place on a routine, objective, and verifiable written recording system. Rule 55 allows no exceptions.

The Seventh Circuit's holding that 18 U.S.C. §3331 does not require entry of an order stands in direct conflict with Rule 55. The integrity of the rule has been eroded by the Seventh Circuit's arbitrary creation of an exception to the scrupulous record-keeping requirements in criminal cases. It is wrong to allow this exception to stand when it defies *both* Rule 55 *and* the express requirements of 18 U.S.C. §3331.

Faced with conflicting decisions in the trial courts and motivated by an intention to "resolve what has became known in the Northern District of Illinois as the 'grand jury issue'," [16] *Taylor*, 841 F.2d at 1301, the Seventh Circuit in *United States v. Taylor* produced a result-oriented interpretation of Section 3331 which violates both the plain

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[16] Anton Valukas, the U.S. Attorney for the Northern District of Illinois at the time, has stated that his embarrassment over the "grand jury issue" was such that he was prepared to resign his office had the Seventh Circuit ruled against the Government and caused 200 convictions to be overturned. Levis & Weir, *The "Tough Tony" Years: Tackling White Collar Crime*, Chicago Lawyer, Jan. 1990, at 52.

language of that statute and the notion of a government constrained by a rule of law. This interpretation of Section 3331 has now taken an even more absurd twist with the Seventh Circuit's decision in the instant case. In this case, the Seventh Circuit for the first time[17] has conceded that no oral or written order now exists and that no order of any kind *ever* existed to extend the term of the Special October 1984 Grand Jury beyond its initial term. *Daniels*, 902 F.2d at 1240-41, App. 2-3. Further, by allowing a judge's uncommunicated mental determination to suffice as an order, the instant opinion has abolished *Taylor*'s requirement of "reliable and unequivocal evidence" to show that a timely extension was made. *Taylor*, 841 F.2d at 1308.

As a consequence of the Seventh Circuit's decision, a district judge overseeing a grand jury may now decide at any time, anywhere, that a grand jury's business is not yet finished, and that grand jury will instantly and automatically be validly extended. The judge's unshared mental determination will be given the force of an order, despite the fact that no record of his thoughts will exist and that no one will know of them.

This approach creates innumerable difficulties regarding compliance with §3331 and cripples the protections afforded criminal defendants by the Fifth Amendment to the U.S.

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[17] In *United States v. Taylor*, 841 F.2d at 1304, the Seventh Circuit presumed the validity of Judge McGarr's *nunc pro tunc* "corrective" order of March 3, 1987. Until the Seventh Circuit's decision in the instant case, the appellate court repeatedly invoked the *nunc pro tunc* order to "settle" the grand jury matter. *See, e.g., United States v. Rivera*, 855 F.2d 420, 423 (7th Cir. 1988). In this case, the Seventh Circuit was finally forced to admit that Judge McGarr's order was "not really an order" when confronted with Petitioner's argument that then-Senior Judge McGarr was absolutely without jurisdiction and that the Government wrote the order. *United States v. Daniels*, 902 F.2d 1238, 1240 (7th Cir. 1990), App. 3.

Constitution.[18] Precise time limits and other formal constraints are placed on special grand juries, and §3331 contains very specific time limitations for both the initial term and any extensions of that term. If a judge's uncommunicated thoughts instantly become law, it will be impossible to determine when a court has taken judicial action and impossible to calculate the beginning or end of an extended grand jury term. Heavy burdens will be placed upon a single judge's ability to perfectly recall the particular moment at which he determined that a grand jury had further business to complete. Even assuming complete judicial integrity, judges are human. The validity of judicial decisions should not depend on the memory and survival of individual judges. If a judge dies, his decision to extend a grand jury should not die with him. The characteristics of fairness, accuracy and equal treatment which support the judicial process depend upon a written, objective record.[19]

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[18] This Court recently has noted the basic constitutional rights implicated when either the grand jury or the indictment is tainted. *See Midland Asphalt Corp. v. United States*, 109 S.Ct. 1494 (1989). The necessity of obtaining an indictment from a grand jury has been considered indispensable to the exercise of jurisdiction by the federal courts since the beginning of the Republic. *See, e.g., Smith v. United States*, 360 U.S. 1 (1959); *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884); *Ex Parte Bain*, 121 U.S. 1, 12-13 (1887).

[19] This case provides an example of the kind of outrageous outcome compelled by the Seventh Circuit's holding that the record of a grand jury's extension can reside solely within the mind of an individual judge. Here, the Seventh Circuit refused to allow inquiry into the truth of a version of the chief judge's "recollections," contrived by the Government and presented surreptitiously to the judge for his signature, despite the fact that the *written* transcripts of the actual grand jury proceedings clearly demonstrate that the Government's version of the judge's recollections is false. *See supra* at 8 n.5, 15-16.

Further, it is imperative that grand juries strictly adhere to the terms of the statutes which authorize them. As a "creature of statute," *United States v. Fein*, 504 F.2d 1170, 1172 (2d Cir. 1974) (quoting *In re Mills*, 135 U.S. 263, 267 (1890)), a grand jury acquires power only through compliance with the terms of its governing statute. Without the authority granted to it by such a statute, a grand jury has no power to act. *United States v. Bolton*, 893 F.2d 894 (7th Cir. 1990) (per curiam); *United States v. Armored Transport, Inc.*, 629 F.2d 1313, 1316 (9th Cir. 1980). In particular, the statutory provisions which govern the length of a grand jury's service, and any extensions thereof, must be scrupulously followed. *See, e.g., United States v. Lang*, 664 F.2d 1232, 1235 (7th Cir.), *cert. denied*, 454 U.S. 870 (1981) (citing *United States v. Macklin*, 523 F.2d 193 (2nd Cir. 1975)). By injecting an element of uncertainty and confusion into a grand jury statute which is clear on its face, the Seventh Circuit has shifted the focus of jurisprudence in the area of grand jury jurisdiction away from the production of a verifiable record, abrogated the very procedural protections the grand jury statute was designed to implement, and seriously undermined basic constitutional rights guaranteed to criminal defendants by the Fifth Amendment.

III.

The Seventh Circuit erred in expanding the "ordinary course of duty" exception to Title III's warrant requirement in direct conflict with other courts of appeals.

In affirming the district court's dismissal of Petitioners' motion to suppress the FBI's wiretap evidence of Petitioner Daniels' telephone conversations from the Metropolitan Correctional Center ("M.C.C."), the Seventh Circuit departed from its own earlier holdings and created a conflict with several other circuits. The Seventh Cir-

cuit upheld an electronic surveillance order based on earlier, unauthorized M.C.C. wiretaps by invoking the exception to Title III's order requirement[20] for surveillance by officers "in the ordinary course" of duty. In doing so, however, the Seventh Circuit not only failed to make the requisite determination that the M.C.C.'s monitoring of Daniels' telephone conversations was a routine and random exercise of prison security, but ignored the evidence showing that the M.C.C.'s surveillance of Daniels was both exceptional and focused.

Section 2515 of Title 18 prohibits the use of intercepted communications, or *evidence derived therefrom*, as evidence in any proceeding. Title III, however, exempts any telephone or other instrument "being used by a . . . law enforcement officer in the ordinary course of his duties." 18 U.S.C. §2510(5)(a)(ii). Every circuit that has addressed the issue of monitoring prison telephone calls under this exception, including, prior to the instant decision, the Seventh Circuit, has held that the such monitoring must be routine and random in order to fall within the exception. *United States v. Sababu*, 891 F.2d 1300 (7th Cir. 1989); *United States v. Feekes*, 879 F.2d 1562 (7th Cir. 1989); *United States v. Paul*, 614 F.2d 115 (6th Cir. 1980); *Campiti v. Walonis*, 611 F.2d 387 (1st Cir. 1979).

The routine and random requirement has been applied to Title III's telephone monitoring exception to insure that unauthorized electronic surveillance occurs only to prevent a breach of prison security. In *United States v. Paul*, *supra*, the Sixth Circuit upheld the use at trial of a prisoner telephone call monitored in accordance with prison rules, which routed all prisoner telephone calls through

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[20] Title III of the Omnibus Crime Control Act, 18 U.S.C. §§2510-2521.

the prison switchboard for random monitoring. 614 F.2d at 116. Further, the goal of prison security was served because the information obtained from monitoring the call prevented the unlawful introduction of drugs into the facility. *Id.* The "ordinary course of duty" exception therefore properly allowed the use of the evidence obtained through the intercepted telephone call.

When prison officials selectively monitor the telephone calls of a specific prisoner with the purpose of obtaining evidence to be used in pending criminal proceedings, however, it cannot be said that the monitoring is either "routine" or "random." The "ordinary course" exception is therefore be inapplicable. In *Campiti v. Walonis*, 611 F.2d 337 (1st Cir. 1979), for example, a prisoner's telephone call to a sheriff who was under investigation was purposefully monitored by prison officials and used in a report on wrongdoing by the sheriff. In an action the prisoner subsequently brought against the officers who monitored his telephone call, the First Circuit determined that the "ordinary course" exception could not apply because the call in issue was not randomly monitored. Even though the prison routinely monitored prisoner telephone calls, prison officers deliberately eavesdropped on this call to gather evidence for use in their investigation, which also had no bearing on prison security. *Id.* at 392. The interception in *Campiti*, just as the interception in the instant case, therefore was not made pursuant to general prison policy regarding routine, random telephone monitoring, but was directed to the specific monitored telephone call as part of a focused investigation. *See United States v. Cohen*, 796 F.2d 20 (2d Cir. 1986) (prison officer may not engage in purely investigative activities and circumvent the Fourth Amendment's warrant requirement by claiming he was acting in the ordinary course of his duties).

The Seventh Circuit's instant opinion, however, totally disregards the "routine and random" limitations on the "ordinary course of duty" exception. The Seventh Circuit's one paragraph analysis of the exception is a mere *ipse dixit*: the lower court invokes the language of the exception, and then simply states that the FBI's monitoring was in their ordinary course of duty. The decision states no authority or fact in support of this conclusion. Rather, the monitoring was in the ordinary course only because the opinion claims it was so.[21]

While the instant opinion cites Seventh Circuit cases for the "ordinary course" exception, it fails to state what these precedents make clear: only random and routine monitoring of prisoner calls undertaken for the purpose of maintaining prison security is permitted. *See United States v. Sababu*, 891 F.2d 1308, 1329 (7th Cir. 1989); *United States v. Feekes*, 879 F.2d 1562, 1566 (7th Cir. 1989). The instant opinion simply ignores the analysis which the Seventh Circuit, and other circuits faced with this issue, have relied upon to determine whether the "ordinary course" exception should apply.

The Seventh Circuit's failure to even address the requirements for applying this exception conceals the factual record, which shows that the M.C.C.'s monitoring of Petitioner Daniels' telephone conversations was anything but routine or random. For example, the record shows that, although Daniels was incarcerated on April 15, 1985, none of his telephone calls were monitored until the first week of July 1985. R. 260, Ex. E. In July and August, however, M.C.C. officers provided the FBI with 17 hour-

[21] The "ordinary course of duty" issue was not raised below since District Court Judge Holderman based his denial of Petitioner's motion to suppress solely on his finding that Petitioner Daniels "consented" to the M.C.C. wiretap. *See* App.77-78.

long cassette tapes of Daniels' telephone calls. R. 260, Exhibits A, B, C, E and G. It could hardly be random for Petitioner to spend roughly ten weeks at the M.C.C. without having *any* of his telephone calls monitored, and then suddenly have a huge number of recorded telephone conversations amassed against him in less than eight weeks.

Nor do the taped telephone calls have any bearing on prison security. As opposed to *United States v. Paul*, *supra*, where defendant attempted to smuggle drugs into prison, or *United States v. Subabu*, *supra*, where the prisoner engaged in telephone calls to arrange the purchase of weapons for an escape, Petitioner's telephone conversations concerned transactions occurring completely *outside* of the prison. The surveillance therefore went beyond preserving prison security and attempted to discover evidence for use in a criminal investigation, removing it from the ordinary course of the prison officers' duties. *See United States v. Cohen*, 796 F.2d at 23-24.

The FBI's later surveillance of Petitioner Daniels was also undisputedly an extensive investigation focused on Petitioner Daniels. Based on the earlier warrantless M.C.C. wiretap, which was used as evidence for probable cause, the FBI obtained a court order authorizing its surveillance. In obtaining the order, the FBI was clearly seeking to comply with Title III's warrant requirement, not invoke an exception to it. The instant opinion, however, ignores Petitioners' argument that the order was improper because it was based entirely on the earlier illegal interceptions—and indeed ignores the M.C.C.'s surveillance entirely—stating only that the FBI's surveillance was in the ordinary course of its duties because surveillance is one of the things that the FBI does and therefore no warrant under Title III was required. This reasoning is completely elliptical and allows the "ordinary course" exception to

swallow the warrant requirement of Title III in its entirety.

The Seventh Circuit's misinterpretation of the statute and departure from the established case law will foster confusion and inconsistent adjudication within the Seventh Circuit and between the courts of different circuits. Not only does the instant opinion abolish the routine and random requirement established by prior cases, but, given a literal reading, completely eliminates the warrant requirement of Title III for *any* investigation, as long as it is performed by an investigative agency. This result is nonsensical.

Additionally, the instant opinion thwarts Congress' intent in enacting Title III. The legislative history of Title III makes it clear that Congress intended to create a strict prohibition on *all* eavesdropping without a court order. S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2113. Moreover, this Court has recognized that Title III is a punitive statute which is to be narrowly construed in favor of the defendant. *United States v. Giordano*, 416 U.S. 505 (1974). The Seventh Circuit, however, gives the "ordinary course of duty" language a liberal reading in favor of warrantless surveillance, directly contrary to the statutory intention. S. Rep. No. 1097, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2113. The Seventh Circuit's reading of §2510(5)(a)(ii) is so broad that it completely consumes the prohibition against warrantless eavesdropping.

Finally, the Seventh Circuit's cavalier treatment of this issue merits attention. Telephone conversations intercepted by the M.C.C.'s warrantless wiretap were used to establish probable cause for the court's later authorization of the FBI's surveillance so that the subsequent monitoring by the FBI pursuant to that order was not valid unless the

M.C.C.'s surveillance was lawful. *See* 18 U.S.C. §2515. The Seventh Circuit's holding, however, completely fails to address the M.C.C.'s surveillance and thereby clearly fails to address this fundamental point of Petitioners' motion to suppress. Instead, the Seventh Circuit summarily makes what is essentially a *de novo* factual finding—that the FBI was engaged in the ordinary course of its duties—on a matter that was never even addressed by the district court, and which is completely contradicted by the evidence that does exist in the record. Basic notions of fairness, and, in this case, notions of privacy embraced by Congress in Title III, should not bend to justify this result. The Seventh Circuit's holding, bereft of any legal analysis and based only on a single conclusory statement, can only be viewed as a result-oriented misreading of the law. This Court must act to correct an injustice that will only be compounded over time if left to stand.

CONCLUSION

For these reasons, this petition for *certiorari* should be granted.

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